Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Direct Access to the	)	IB Docket No. 98-192
INTELSAT System	)	File No. 60-SAT-ISP-97
	)	

REPLY OF PANAMSAT CORPORATION

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby submits this reply in the above-referenced Notice of Proposed Rulemaking ("NPRM").

DISCUSSION

Comments from parties representing virtually every sector of the satellite services industry support the Commission's effort to end Comsat's monopoly over the provision of Intelsat capacity within the United States and to allow Comsat's customers to deal directly with Intelsat, or with competitive providers of Intelsat-based services. Comsat and its suitor — Lockheed Martin — oppose such "direct access," primarily on three grounds.

First, Comsat asserts, the statutory provisions suggesting that Comsat is to be the sole participant in Intelsat also mean that Comsat is to have sole access to the Intelsat system within the United States. Second, while glossing over basic principles of "takings" jurisprudence with a lengthy, but seriously flawed, analysis, Comsat claims that the establishment of a direct access regime would constitute a taking of its property. Finally, although Lockheed Martin recognizes that the policy implications of direct access are far reaching and that the issue, like many others relating to Comsat's future role, should be left to Congress, Comsat insists that direct access should be rejected on policy grounds.

PanAmSat agrees that the Commission should defer action on direct access until Congress has had a reasonable opportunity to enact legislation updating the Satellite Act. If, however, the Commission chooses not to defer to Congress, the balance of the comments establish that the Commission should authorize Level 3 direct access, reject

Comsat's attempt to impose a surcharge on direct access customers, and grant Comsat's customers fresh look rights.

I. The Commission Should Defer Action On The NPRM Pending Action By Congress.

As Lockheed Martin recognizes in its comments, direct access is likely to be at issue in the "examination [of] all aspects of Comsat's role in Intelsat that will be undertaken by Congress early in the [current] term."[1] At this time, there is every indication that Congress will, this year, deal comprehensively with this issue along with other issues relating to Comsat's future, including its Signatory role, the proposed acquisition of Comsat by Lockheed Martin, and Intelsat privatization.[2] If the Commission were to act now in advance of Congress, any new satellite legislation enacted may require the Commission to duplicate its efforts and re-examine the same issues within a new statutory framework.

II. The Satellite Act Does Not Prohibit Direct Access.

As virtually every other party recognized, "Comsat's monopoly finds no protection in either the Satellite Act, previous Commission orders, or in federal court decisions regarding Comsat."[3] In an effort to cloud this point, Comsat recites every instance in which the Satellite Act provides that Comsat is the only entity entitled to be a participant in Intelsat, and every case in which the Commission or a court has restated the Commission's current policy of permitting only Comsat to access the Intelsat system. Comsat then attempts to combine these two separate lines of authority in support of its claim that the Satellite Act provides Comsat with a monopoly on access to Intelsat.

It simply is not so. Although the Satellite Act made Comsat the exclusive U.S. participant in Intelsat, that statutory exclusivity is limited to investment in, and the

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[1] Comments of Lockheed Martin at 4. Lockheed Martin also suggests that action on direct access may "distract" the Commission and Congress from issues relating to Intelsat privatization. This position contrasts with Comsat's long-held view that Intelsat privatization is a matter for the Signatories to decide, with little or no intervention from the U.S. government.

[2] See Communications Daily, Congress Wants to Decide on Comsat Ownership (Jan. 25, 1999) (discussing draft bill of House Commerce Committee Chairman Bliley and Senate Communications Subcommittee Chairman Burns).

[3] Comments of Sprint Communications Company, L.P. at 2; see also Comments of GE American Communications, Inc. at 4-7; Comments of AT&T at 2-5.

governance of, the Intelsat system; it does not encompass access to Intelsat space segment.[4] Whatever Comsat thinks the Satellite Act should say, no amount of posturing can hide the fact that it does not prohibit Level 3 direct access.

III. Comsat's "Takings" Argument Is A Red Herring.

In support of its claim that the establishment of a direct access regime would constitute a "taking," Comsat has provided an analysis of the issue prepared by one of its outside consultants. Somehow, in the course of some thirty-plus pages of discussion, the author of that study misses several points fundamental to any takings analysis.

As most other commenting parties recognized, Comsat's taking claim is premised on the notion that it has a "property" interest in its monopoly access to the Intelsat system. However, "neither the Satellite Act nor the regulatory scheme created by it confers on Comsat an exclusive right to access Intelsat satellites from the United States. Thus there is nothing to be taken from Comsat."[5]

The Satellite Act is not in form either a contract or a conveyance of a property interest. Moreover, Section 302 of the Satellite Act, 47 U.S.C. § 732, expressly reserves for Congress the right to repeal, alter, or amend that Act. This reservation undermines any claim that the Satellite Act conferred upon Comsat a "contract" (a mutual exchange of promises) or a "property" interest (an entitlement based on mutually explicit understandings),[6] entitling it to perpetual exclusive access to Intelsat.[7] To the

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[4] Comments of Loral Space & Communications LTD at 1; AT&T Comments at 2; Sprint Comments at 3.

[5] Sprint Comments at 6; see also AT&T Comments at 6 ("Comsat has no vested right in exclusive access to the Intelsat system that would constitute property.").

[6] See Perry v. Sindermann, 408 U.S. 593, 601 (1972).

[7] United States v. Winstar, 116 S. Ct. 1432, 2452 (1996), is not to the contrary. The existence of a contract in the first instance must be established before the Government may be liable for breach of contract. Section 302 of the Satellite Act makes it plain that the Congress did not "promise" to Comsat that it would leave its role in the market unchanged. Moreover, the facts of Winstar were readily distinguishable from those presented here. In Winstar, an agency arranged to have certain financially healthy institutions merge with failing thrifts. As part of the "principal inducement" for them to do so, id. at 2442, and as one of the "express arrangements between the regulators and the acquiring institutions," id. at 2445, the acquiring institutions were permitted to use certain accounting treatments that were outside of the norm. Indeed, the parties ratified a "Supervisory Action Agreement" that contained an integration clause characterizing the relationship between the Government and the acquiring institutions in contractual terms. Id. at 2449. Finally, the accounting treatment at issue was used in each transaction to cover a specific dollar-amount difference between the assets and the liabilities of

contrary, Comsat has been on notice since 1962 that its privileged role in the market may change at any time — hardly the stuff that contracts are made of.

Indeed, as Comsat appears to acknowledge, Congress had no need to make the reservation in Section 302 if its purpose was merely to retain the power to later amend the Satellite Act; that power always inheres in any legislation.[8] The more reasonable interpretation of Section 302, therefore, is that Congress meant to foreclose any claim that the Satellite Act evidences a promise by the United States that Comsat would for all time have exclusive access to the Intelsat system.[9]

Even if Comsat could establish a "contract" right to its monopoly over access to Intelsat, its reliance on the *per se* takings doctrine is misplaced; the *per se* takings doctrine applies only when the government authorizes a permanent physical occupation of tangible real or personal property.[10] The *per se* doctrine does not apply to takings claims based on intangible or contract rights, except for rare instances in which the right arguably taken is tied inextricably to the beneficial use of land.[11]

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the failed thrifts. Id. at 2448. Thus, unlike the amorphous implied promise posited by Comsat to have been made in the Satellite Act, the promises in Winstar were tied to specific transactions, specific express agreements, and specific amounts.

8 See Comsat Comments at 38.

9 Even if the Satellite Act were found to confer a contractual right upon Comsat, the reservation of authority in Section 302 would defeat any claim that the federal government promised that Comsat would be the exclusive provider of access to Intelsat in perpetuity. There is a substantial line of authority upholding legislation that alters or repudiates contracts — even contracts with the government itself — where the original statute included language reserving Congress' right to repeal, alter, or amend the act. See, e.g., Bowen v. Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 53-54 (1986); National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 467-69 (1985); Sinking-Fund Cases, 99 U.S. 700, 720 (1878).

10 Yee v. Escondido, 112 S. Ct. 1522, 1526 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); National Wildlife Fed'n v. ICC, 850 F.2d 694, 706 (D.C. Cir. 1988).

11 See, e.g., United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989) (distinguishing between money, which is not subject to the *per se* doctrine because it is fungible, and "real or personal property"); Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1172 (Fed. Cir.) (government act precluding surface mining of a particular site a *per se* taking), cert. denied, 112 S. Ct. 406 (1991). Even if tangible property were involved, the government action at issue is not the kind that would give rise to a *per se* takings claim. Aside from cases in which the government compels a permanent physical occupation of property, the only instances in which courts have found *per se* takings are those in which government actions deny "all economically beneficial or productive use of land." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992); see also Agins v. Tiburon, 447 U.S. 255, 260 (1980); 767 Third Avenue Assoc. v. United States, 48 F.3d 1575, 1583 (Fed. Cir. 1995).

Finally, assuming *arguendo* that Comsat could identify a property right, the establishment of direct access would not constitute a regulatory taking. As the courts have made clear time and time again, the "mere diminution in the value of property, however, serious, is insufficient to demonstrate a taking."[12] Direct access will not bar Comsat from providing service to the same customers to which it presently provides service, from obtaining space segment from Intelsat, or from otherwise participating in the market.

At most, direct access will affect Comsat's ability to earn a monopolists' rate of return.[13] The establishment of a direct access regime is not, therefore, the kind of confiscatory regulation that would give rise to a regulatory takings claim. Indeed, under a Level 3 direct access regime Comsat will earn a 21 percent return on Intelsat capacity accessed by other carriers from the U.S., which "certainly exceeds the constitutional standard."[14]

V. Policy Considerations Warrant The Elimination Of Comsat's Monopoly On Access To The Intelsat System.

The commenting parties generally support the Commission's policy judgment that ending Comsat's monopoly on access to Intelsat will enhance competition and promote consumer welfare.[15] By ending Comsat's monopoly, direct access would allow customers to avoid Comsat's substantial mark-ups on Intelsat services and negate the advantages that some foreign carriers have over U.S. operators.[16]

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12 Concrete Pipe and Products v. Construction Laborers Pension Trust, 508 U.S. 602, 642 (1993) (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915)). It is "settled beyond dispute" that regulation of private property for the public good is constitutionally permissible so long as the regulation is not "confiscatory." FCC v. Florida Power Corp., 480 U.S. 245, 253 (1987); see also Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) (government limitations on utility charges not a taking of property unless the rates set are confiscatory); Covington and Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597 (1896) (a rate is confiscatory if it destroys the value of the property entirely).

13 AT&T Comments at 9 (at most direct access will cause the loss of Comsat's monopoly rents).

14 Cable & Wireless Comments at 9.

15 See, e.g., Loral Comments at 4 (Comsat's monopoly "distorts the satellite services market in a way that is contrary to the public interest because it inhibits competition"); Sprint Comments at 2 (Comsat's monopoly "results in higher prices, fewer choices and lower quality services for U.S. consumers").

16 See Loral Comments at 6.

Comsat, on the other hand, attempts to minimize the pro-competitive aspects of direct access and to stress what it characterizes as the "adverse consequences" of allowing Intelsat to provide services directly in the United States.[17] Comsat's position is that the cost savings that would result from direct access would be minimal and that Intelsat's various privileges and immunities, which are even more substantial than those available to Comsat, would enable Intelsat to use direct access to act anti-competitively.

The first of these arguments simply is implausible. Comsat's charges to end users far exceed Intelsat's underlying charge for satellite capacity. As PanAmSat noted in its comments, the extent of Comsat's mark-up of the IUC suggests that Comsat either is earning excess rewards or is spending nearly as much on support and marketing as Intelsat is spending to design, build, launch, operate, insure, and maintain a global satellite system. To now argue that the elimination of this mark-up would not result in a significant cost savings defies common sense.

Second, in arguing that a non-privatized Intelsat would be a danger to competition in the U.S. market because of its various privileges and immunities, Comsat merely is reinforcing what PanAmSat has been saying for years: The privileges and immunities available to intergovernmental organizations such as Intelsat, and derivatively to Comsat, are anathema to a competitive market.[18] For that reason, PanAmSat suggested in its comments that, if Intelsat is to provide service directly to U.S. customers, its commercial activities in the United States should be regulated on the same basis as other operators.[19]

VI. The Imposition Of A Surcharge Would Undermine Many Of The Competitive Benefits To Be Gained By Direct Access.

In its comments, Comsat continues to argue that direct access customers should be subject to a surcharge to defray Comsat's costs. Other parties, however, point out that the proposed surcharge will function merely as a "device for Comsat to pass along

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17 Comsat Comments at 42-81.

18 DISCO II, 12 FCC Rcd 24094, 24138, 24148 (1997).

19 Pursuant to recent amendments to the Foreign Corrupt Practices Act, Pub. L. No. 105-366, 112 Stat. 3302 (1998), the Commission may declare that Intelsat has no immunity from suit or legal process in this country for its commercial actions. The Commission should, however, require that, as a condition on entry into the "retail" market in the United States, Intelsat acknowledge that such immunity is lacking.

the costs of its inefficiencies to other carriers."[20] In fact, there is no compelling reason to allow Comsat to impose a surcharge on direct access customers.

Comsat receives a guaranteed return of up to 21 percent on its investment in Intelsat. If the Commission adopts direct access, Comsat will receive this return not only on Intelsat capacity for which it is a service provider, but also on Intelsat capacity as to which direct access customers, rather than Comsat, provide the service and Comsat's sole function is that of Signatory. A 21 percent return is more than adequate to compensate Comsat for whatever costs it incurs in fulfilling its Signatory functions. Indeed, Canada recently adopted a direct access system that does not include any surcharge or Signatory fee on direct access customers.[21] Nor, to PanAmSat's knowledge, do any of the other administrations permitting direct access assess such a fee or surcharge.

The 21 percent return that Intelsat's customers fund by paying for service is enough to compensate Comsat for the costs of its Signatory activities. Comsat should not be allowed to reap a double recovery of those costs through an added surcharge.

VII. If Direct Access Is To Be Meaningful, Comsat's Customers Should Be Allowed "Fresh Look" Rights.

Finally, several parties — including some of Comsat's largest customers — agree with PanAmSat's position that, if direct access is to be meaningful, Comsat's existing customers must be permitted to terminate their existing agreements without penalty and take a "fresh look" at the new, more competitive market.[22] Absent "fresh look" rights, the establishment of direct access will be of little assistance in eliminating Comsat's current monopoly.

CONCLUSION

For the reasons set forth herein and in PanAmSat's comments, the Commission should defer action on the NPRM until Congress has had a reasonable opportunity to enact legislation updating the Satellite Act. If, however, the Commission does act on

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20 GE Americom Comments at 11.

21 See Industry Canada, Intelsat and Inmarsat Restructuring and Access (Information and Recent Initiatives), RP-009 (Dec. 1998).

22 See Sprint Comments at 10-14; AT&T Comments at 13; Comments of MCI WorldCom, Inc. at 24-29.

the issues raised in the NPRM, it should authorize Level 3 direct access in all markets and on all routes, reject Comsat's attempt to impose a surcharge on direct access customers, subject Intelsat to the same degree of regulation faced by other commercial satellite operators, and grant Comsat's existing customers fresh look rights.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply of PanAmSat Corporation was sent by first class mail, postage prepaid, this 29th day of January, 1999, to the following:

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